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No. 723

In the Supreme Court of the United States

OCTOBER TERM, 1947

KURT G. W. LUDECKE, PETITIONER

v.

W. FRANK WATKINS, AS DISTRICT DIRECTOR OF IMMIGRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinions of the District Court for the Southern District of New York (R. 22–41) are not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 44–45) is reported at 163 F. 2d 143.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on July 24, 1947 (R. 45). The petition for a writ of certiorari was filed on October 21, 1947, and certiorari

was granted on April 5, 1948 (R. 46). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below properly held that it lacked power to review a removal order, issued by the Attorney General pursuant to the Alien Enemy Act and Presidential Proclamation 2655, against petitioner, an admitted alien enemy.

2. Whether the power so to remove petitioner has lapsed because of the cessation of hostilities between the United States and Germany.[1]

STATUTE, PROCLAMATION, AND REGULATIONS INVOLVED

The provisions of the Alien Enemy Act of 1798, R. S. 4067–4070, as amended, 40 Stat. 531, 50 U. S. C. 21–24, are set out in Appendix A, *infra*, pp. 31–33. The text of Presidential Proclamation 2655 (10 F. R. 8947) and of the Attorney General's regulations issued pursuant to the latter Proclamation are set forth in Appendices B and C, respectively, *infra*, pp. 33–36, 36–38.

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[1] The second question presented has been fully briefed and argued by the Government, and is presently pending before this Court for decision in *Paul Ahrens, et al.* v. *Clark*, No. 446, this Term. We do not discuss the question herein but respectfully refer the Court to our brief in the *Ahrens* case.

STATEMENT

This proceeding was instituted in the District Court for the Southern District of New York on October 14, 1946, by the filing of a petition for a writ of habeas corpus (R. 1–2). Petitioner, a German alien enemy, alleged that his detention at Ellis Island, New York, was illegal in that he was being held solely pursuant to a removal order issued by the Attorney General and not by virtue of any court order or decree (R. 1). Petitioner also challenged the validity of the administrative hearings which preceded the issuance of the removal order (R. 2). A writ of habeas corpus was issued on October 18, 1946 (R. 22). The return to the writ, filed on October 28, 1946, on behalf of respondent, District Director of the Immigration and Naturalization Service for the District of New York, showed that petitioner, born in Berlin, Germany, on February 5, 1890, was a German national, and was being held in custody as an alien enemy pursuant to the Alien Enemy Act of 1798 and Presidential Proclamations issued thereunder; and that he was subject to a removal order issued by the Attorney General on January 18, 1946 (R. 3). A copy of the removal order was annexed to the return (R. 3–4).

A hearing was held before the district court on October 29, 1946 (R. 36). By opinion dated

November 6, 1946 (R. 22–35), the district judge rejected the Government's contention that the only question open for judicial consideration was the question of alien enemy status (R. 33). However, he went on to hold that petitioner had been accorded a full and fair hearing before the hearing boards, that the removal order was supported by substantial evidence, and that the order of the Attorney General was accordingly binding (R. 33–35). The writ was dismissed on November 6, 1946 (R. 35). A rehearing on December 26, 1946 (R. 36–41), granted by the district court, again resulted in dismissal of the writ of habeas corpus (R. 41).[2] In its opinion on rehearing, dated January 2, 1947, the district court noted the decision of the Second Circuit Court of Appeals on December 31, 1946, in *United States ex rel, Schlueter* v. *Watkins;* 158 F. 2d 853, in which the court below held that judicial scrutiny of removal orders of the type here involved was limited to the question of alien enemy status (R. 40–41). Upon appeal, the court below affirmed the dismissal of

[2] At the first district court hearing on October 29, 1946, petitioner declined the court's suggestion that he have the assistance of an attorney and elected to proceed *pro se* (R. 26, 36–37). At this hearing, the court received a long written statement by petitioner, together with attachments, and considered these papers as having "* * * the same force and effect as if he [petitioner] had testified to them * * *" (R. 33, 36). After the October 29, 1946, hearing, the district judge assigned counsel to advise petitioner and permitted the matter to be reopened for the purpose of hearing additional evidence presented by petitioner and counsel (R. 36–37).

the writ (R. 45), holding that it saw "* * * no reason for discussing the nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General for the reason that his order is not subject to judicial review * * *" (R. 44).

SUMMARY OF ARGUMENT

The words of the Alien Enemy Act make it clear that the power granted the President in Section 21 of that Act is an independent power not requiring the aid of the courts for its effectuation. Section 21 has been thus construed ever since the War of 1812, and the rationale of those decisions not only confirms the conclusion that the Executive may effectuate his removal orders without judicial intervention but also makes it clear that Executive orders of removal are not to be subjected to judicial scrutiny.

That Congress did not intend judicial intrusion into the Executive exercise of powers conferred by the Alien Enemy Act is made perfectly clear by the legislative history of the Act which reflects a Congressional impatience with anything which would delay the summary enforcement of the power conferred by the Act over alien enemies. The nature of governmental power over alien enemies and of the judgment which the Act requires of the Executive is such that it would be wholly inappropriate for the courts to review Executive determinations in this

field. The power of Government, over alien enemies is an aspect of the war power, and the judgment required of the Executive is a political judgment. Under these circumstances, the Constitution does not require that judicial review be supplied when it was withheld by Congress.

In delegating part of his authority to the Attorney General, the President did not create the right to a judicial review of the question whether the Attorney General was acting within the scope of the delegated authority. Nothing in the Proclamation granting the Attorney General his authority creates the right of judicial review, and to infer such a right would be wholly inconsistent with the nature of the program being administered. Certainly when Congress has withheld jurisdiction from the federal courts in cases of this sort, the President cannot confer it.

ARGUMENT

THE ATTORNEY GENERAL'S ORDER FOR THE REMOVAL OF PETITIONER, AN ADMITTED ALIEN ENEMY, IS NOT JUDICIALLY REVIEWABLE.[2]

On January 18, 1946, the Attorney General ordered that petitioner be removed from the United States. In the order, it was recited [redacted] upon full hearing before the Alien Enemy Hear-

[2] Although respondent concedes that the question of alien enemy status is judicially reviewable, that question is not here involved, since petitioner, a German national, is admittedly an alien enemy.

ing Board on January 16, 1942, and the Repatriation Hearing Board on December 17, 1945, petitioner was found to be an alien enemy deemed dangerous to the public health and safety of the United States. This removal order was issued pursuant to President Truman's Proclamation 2655 (Appendix B, *infra*, pp. 33–36), issued on July 14, 1945 (10 Fed. Reg. 8947), authorizing the Attorney General to order the removal from the United States of "all alien enemies now or hereafter interned within the continental limits of the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States." Proclamation 2655, in turn, was issued under the authority vested in the President by Section 21 of the Alien Enemy Act of July 6, 1798 (1 Stat. 577), Appendix A, *infra*, p. 31.[1]

The essence of petitioner's attack on the issuance of the removal order here involved is a denial that the statutory power of the Executive, to intern and remove all alien enemies during "declared war", is plenary and not subject to judicial review or intervention (see, *e. g.*, Pet. 6–7, 8, 9–10, 14–15, 30, 31, 33). That his attack has no basis is clear, we submit, from the face of the

[1] By Proclamation 2526, dated December 8, 1941 (6 Fed. Reg. 6323), the President had authorized the Attorney General to intern German alien enemies. This proclamation was also issued pursuant to Section 21 of the Alien Enemy Act. Petitioner was interned under the proclamation by order dated December 8, 1941 (R. 26).

Alien Enemy Act of 1798, its legislative history and the judicial precedents involving its application to the effect that the power there granted to the President is plenary, and the orders issued by the Executive pursuant thereto, whether for the internment or removal of alien enemies, are not subject to judicial review, and do not require the intervention of the judiciary to make them enforceable.

A. *The Alien Enemy Act authorizes the President to remove alien enemies without the intervention of the courts.*—The Alien Enemy Act of 1798 clearly provides two alternative, and mutually exclusive, methods pursuant to which an alien enemy may be restrained or removed out of the territory of the United States during time of war. The first is set out in Section 21. See Appendix A, *infra,* p. 31). The President is there authorized to direct by proclamation the conduct to be observed, on the part of the United States, toward the aliens who become liable to be apprehended, restrained, secured and removed as alien enemies. He is further authorized to proclaim the manner and degree of the restraint to which these alien enemies shall be subject and in what cases, and to provide for their removal if they refuse or neglect voluntarily to depart.

The second independent method for dealing with alien enemies during wartime is provided in Section 23. See Appendix A, *infra,* pp. 32–33. By that Section, the several courts of the United States

having criminal jurisdiction, are authorized and required, upon complaint against an alien enemy, to hold a full examination and hearing to determine whether the alien enemy is dangerous to the public peace or safety, and if sufficient cause should appear, the court is authorized to order the alien enemy restrained or removed out of the territory of the United States.

That these are mutually exclusive procedures for the issuance and effectuation of removal orders is made clear by Section 24 of the Act (Appendix A, *infra*, p. 33) which treats Executive orders under Section 21 as of equal dignity, and on a parity, with comparable orders judicially issued under Section 23. Section 24 imposes an identical duty on the marshal of the district in which the alien enemy was apprehended to cause the removal of the alien whether that removal "is required by the President, or by order of any court, judge, or justice." It is "the warrant of the President, or of the court, judge, or justice" which is a prerequisite to action by the marshal.

Squarely supporting the conclusion which we believe to be compelled by the text of the Act, that Section 21, in and of itself, is sufficient for the effective exercise of the removal power,[5] are the

[5] The rule of construction laid down by this Court in *Martin* v. *Mott*, 12 Wheat. 19, 31–32, strengthens this conclusion. It was there held:

Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute con-

decisions in the *Lockington* cases, arising out of the War of 1812. What was said in those cases is relevant not only with respect to the view that the President has complete power under Section 21, and need not resort to the courts, but also to sustain the broader proposition discussed *infra*, pp. 15–29, that Executive action under Section 21 is not judicially reviewable.

Lockington was a British subject who had violated regulations issued under the Act during the War of 1812. War had been declared on June 18, 1812, but it was not until February 23, 1813, that an order was issued requiring alien enemies to retire to points more than forty miles from tidewater. After having voluntarily retired in compliance with the regulations, Lockington returned to Philadelphia and refused to depart therefrom. Upon being seized by the marshal for this disobedience, Lockington obtained a writ of habeas corpus from the Chief Justice of the Pennsylvania Supreme Court. In dismissing the writ, the Chief Justice gave short shrift to the contention that the President may act only through the courts. Chief Justice Tilghman there pointed out (*Lockington's Case*, Brightly (Pa.) 269, 280):

> The president, being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accord-

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stitutes him the sole and exclusive judge of the existence of those facts.

> ingly, we find that the powers vested in him are expressed in the most comprehensive terms. He is to make any regulations which he may think necessary for the public safety, so far as concerns the treatment of alien enemies. It is certain, that these powers create a most extensive influence, which is subject to great abuse; but that was a matter for the consideration of those who made the law, and must have no weight with the judge who expounds it. The truth is, that, among the many evils of war, it is not the least, to a people who wish to preserve their freedom, that, from necessity, the hands of the executive power must be made strong, or the safety of the nation will be endangered.

On January 1, 1814, the Pennsylvania Supreme Court, per the Chief Justice and two other Justices, denied Lockington's second petition for a writ of habeas corpus. *Id.* at 283, *et seq.* The concurring opinion of Yeates, J., indicates an understanding that Section 21 authorizes the removal of alien enemies out of the territory of the United States "without being under the necessity of recurring to the judicial authority for that purpose." *Id.* at 292. And Judge Brackenridge, in his opinion, characterized alien enemies as prisoners, much as prisoners of war, with respect to whom the "president would seem to be constituted * * * with the power of a Roman dictator or consul, in extraordinary cases, when the republic was in danger, that it sustain no damage; *ne*

quid detrimenti respublica capiat" (pp. 295–296). He referred (*id.* at 296) to a case, which Government counsel have been unable to discover, in the following terms:

> A report has been read from a gazette, of a decision of a court of the United States, Chief Justice Marshall and Judge Tucker composing that court,—great names, and in high station. This report, if correct, carries with it evidence that the executive authority was warranted in apprehending, etc., without the intervention of the judicial power.

And he went on to state (*id.* at 297–298):

> But I do not see that the courts of the United States have the power to interfere on any ground, on behalf of such description of persons. * * * The return of the marshal that he holds an applicant as an alien enemy * * *; and the admission by the applicant that he is of such description of persons; no traverse tendered as to his not being such, exclude, in my opinion, the interposition of this court, or of any other court.

Lockington thereafter was released on parole and, in April, 1814, sued the marshal, in a federal circuit court, for assault and battery and false imprisonment. *Lockington* v. *Smith*, 15 Fed. Cas. No. 8,448 (C. C. D. Pa.). Mr. Justice Washington (then a justice of the United States Supreme Court), although allowing on technical grounds a demurrer to the marshal's plea of justification,

made it clear that Lockington's attack on the enforcement of the Act was untenable, observing that the President's power under Section 21 of the Act "appears to me to be as unlimited as the legislature could make it" (p. 760). In dealing with the contention that the President could only enforce his regulations through the courts, he said (p. 761):

> Such a construction would, in my opinion, be at variance with the spirit as well as with the letter of the law, the great object of which was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge. It was certainly proper, and, in many cases it might be highly beneficial to the public safety, to vest in the judiciary a power to enforce the ordinances of the president, in every case which should be regularly brought before it. But to bring this power into action, there must be a specific complaint against some particular individual, and a regular hearing of each case must be had. If no person will take upon himself the task of becoming an informer, at all times and under any circumstances an unpleasant one, is the public safety to be jeoparded, however imminent the president may know the danger to be? Certainly, this never could have been the intention of the legislature. If only judi-

> cial interference can be resorted to, it is most obvious that the means are altogether inadequate to the end for which the law meant to provide. * * * Nothing in short, can be more clear to my mind, from an attentive consideration of the act in all its parts, than that congress intended to make the judiciary auxiliary to the executive, in effecting the great objects of the law; and that each department was intended to act independently of the other, except that the former was to make the ordinances of the latter, the rule of its decisions.

Thus, it is plain that those who were nearest to the adoption of the Constitution and the enactment of the Alien Enemy Act were in accord that the power granted by that Act to the President to order the removal of alien enemies in time of war was ample for its effective enforcement and that the intervention of the courts was not required.* Accord: *Ex parte Graber,* 247

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*In this connection, it may be noted that further evidence of contemporary Congressional understanding of the scope of the Presidential power under the Alien Enemy Act is contained in debates on alien enemy legislation in 1812 and 1813. By the Act of July 6, 1812, 2 Stat. 781, Section 22 (Appendix, *infra*, p. 32), concerning voluntary departure of alien enemies "not chargeable with actual hostility, or other crime against the public safety," was amended by providing that the treaties therein mentioned should not be deemed to mean treaties expiring before the issuance of the Presidential Proclamation. The Act of July 30, 1813, 3 Stat. 53, provided that residents of the United States who, before June 18, 1812, had declared their intention of becoming United States citi-

Fed. 882 (N. D. Ala.); *Minotto* v. *Bradley*, 252 Fed. 600 (N. D. Ill.).

Thousands of alien enemies have been restrained under this Act during the War of 1812, World War I and World War II without resort to the courts. We submit that the time has long passed since the propriety of this procedure could seriously be questioned.

B. *Congress, in the Alien Enemy Act, contemplated no judicial review of executive orders of removal.*—"Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied." *Switchmen's Union* v. *Board*, 320 U. S. 297, 301. Section 21 of the Alien Enemy Act, under which the order here in question was issued, makes no

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zens, might be admitted to citizenship notwithstanding they were alien enemies: "*Provided*, That nothing herein contained shall be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien." In the Congressional debate preceding the passage of this Act, the need for mitigating the rigors of the naturalization law to permit the naturalization of alien enemies of the class mentioned above was emphasized by the statement that "they are subject and liable, according to a power vested in the President by an act passed in 1798, to be exiled from their homes, their families, and property, to any distant place designated by him within the limits of the United States, or *at his pleasure may be ordered entirely out of the country.*" 26 Annals of Congress, 13th Cong., 1st Sess., p. 466. (Italics supplied.)

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provision for judicial review, and, indeed, its legislative history clearly shows that no judicial review was contemplated. The Alien Enemy Act was passed at a time when war with France was imminent (9 *Works of John Adams* (1854) 156–157), and the Congressional debates are striking in their reflection of a Congressional purpose to grant to the President a broad, summary power over alien enemies. Thus, Mr. Rutledge said (Annals of Congress, 5th Cong., 2d Sess., p. 1574) that:

> In fact, in the situation of things in which we are now placed, the President should have the power of removing such intriguing agents and spies as are now spread all over the country. What, said Mr. R., would be the conduct of France, if in our situation? In twenty-four hours every man of this description would either be sent out of the country or put in jail, and such conduct was wise.

Mr. Otis' opinion (*id.* at 1576) was:

> * * * that something ought to be done which should strike these people with terror; * * * he did not wish to give them an opportunity of executing any of their seditious and malignant purposes; he did not desire, in this season of danger, to *boggle* about slight forms, nor to pay respect to treaties already abrogated, but to seize these persons, wherever they could be found carrying on their vile purposes.

He further stated (*id.* at 1791):

It was necessary the President should have the power of judging in this case, and that punishment ought not to depend upon the slow operations of a trial.

Mr. Sitgreaves pointed out (*id.* at 1577) that:

All understand the right to which aliens are entitled by the laws of nations. They are no more than the rights of hospitality, and this right varies according to the relation in which the country from which they come, and that in which they reside, is peaceable, or otherwise.

We do not owe to the citizens of France residents in this country (since France had been mentioned) the same hospitalities which we owe to those foreigners who are alien friends; though he confessed there were rights of hospitality which could not be done away in time of war, particularly as it respects alien merchants, which were provided for in this resolution. And except a person had an actual agency in designs which would endanger the peace of the country, though he was ordered out of the country, a free passage would be given to himself and effects; and if actually engaged in designs against the country, there would be a strong necessity for restraining the liberty of any such persons.

And Mr. Sewall remarked (*id.* at p. 1790):

The intention of this bill is to give the President the power of judging what is proper to be done, and to limit his authority in the way proposed by this bill. In

> many cases, it would be unnecessary to remove or restrict aliens of this description; and he believed it would be impossible for Congress to describe the cases in which aliens or citizens ought to be punished, or not; but the President would be able to determine this matter by his proclamation.

Statements such as these are wholly inconsistent with the view, asserted by the petitioner, that the Executive order of removal issued against him is reviewable by the courts. Evidencing as they do an obvious impatience with delay, ever since the *Lockington* cases, led the courts consistently to rule ~~these statements have~~, that the only question open to them was whether the subject of the restraining or removal order was in fact an alien enemy. That question out of the way, as it is here, the judicial function is at an end.[1]

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[1] *United States ex rel. Schlueter* v. *Watkins*, 158 F. 2d 853 (C. C. A. 2); *United States ex rel. De Cicco* v. *Longo*, 46 F. Supp. 170 (D. Conn.); *United States ex rel. Zdunic* v. *Uhl*, 46 F. Supp. 688 (S. D. N. Y.), reversed on another ground, 137 F. 2d 858 (C. C. A. 2); *Ex parte Gilroy*, 257 Fed. 110 (S. D. N. Y.); *Ex parte Risse*, 257 Fed. 102 (S. D. N. Y.); *Banning* v. *Penrose*, 255 Fed. 159, 160 (N. D. Ga.); *Ex parte Fronklin*, 253 Fed. 984 (N. D. Miss.); cf. *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140 (C. C. A. 2), certiorari denied, 332 U. S. 838; *De Lacey* v. *United States*, 249 Fed. 625, 628 (C. C. A. 9); *United States* v. *Tamm*, 247 Fed. 968, 971 (E. D. Wis.), affirmed *sub nom. Grahl* v. *United States*, 261 Fed. 487 (C. C. A. 7).

And see cases referred to *infra*, pp. 19–22.

The first decision of the district court in the instant case seems to be the only judicial expression of a divergent view. But the district court, faced with an expression of the rule

We have already adverted to the opinions of the distinguished judges of the same generation as the legislators who made up the Fifth Congress to the effect that the President was granted, by the Alien Enemy Act, the power to restrain and remove alien enemies "without the intervention of the judicial power." See *supra*, pp. 10–14. That view has survived the years.

In *Ex parte Graber*, 247 Fed. 882, 886 (N. D. Ala.), the court thus stated this established principle:

> The court is of the opinion that such is the true construction of section 4067, R. S. U. S., and that the President, or the officers through whom he acted, is the exclusive judge of whether Graber was such an alien enemy as for the safety of the United States should be restrained as provided by law.
>
> "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since, in addition to the high qualities, which the Executive must be presumed to possess of public virtue and honest devotion to the

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stated in the text by the Circuit Court of Appeals for the Second Circuit, did not repeat in its second opinion, its view that the finding of the Attorney General was, to some extent, reviewable. See *supra*, p. 4.

> public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny." *Martin* v. *Mott*, * * * [12 Wheat. 19, 31].

In *Minotto* v. *Bradley*, 252 Fed. 600, 602, 603 (N. D. Ill.) which also involved the internment of an alien enemy during World War I, the district court, following the unanimous view of the earlier cases, refused to review the order interning petitioner:

> * * * if, under a construction of the act of Congress, a person comes within the definition of an alien enemy, clearly it was within the power of Congress to deal with such alien as it saw fit; and if the law has prescribed how an alien enemy should be dealt with, either by executive proclamation or through the various administrative agencies of the government, the petitioner cannot complain. The sole question, as I see it, is: Is the petitioner an alien enemy, as defined by Congress? If the petitioner is not an alien enemy, the writ in this case must issue.
>
> * * * * * *
>
> The determination by the President whether the facts justify the internment of the petitioner, provided he is an alien enemy, is not to be investigated by the courts. The courts, in the nature of things,

> are precluded from discussing those facts. If the President were required to disclose the basis for his warrant, the entire purpose of the statute might be frustrated. The only question to be settled here is whether, under the construction of this statute, the petitioner is a "native, citizen, denizen or subject" of a power with which we are at war.

This view has been adhered to upon review in regard to World War II alien enemies by the various circuit courts of appeal which have considered the question. In *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F. 2d 898, 900, the Circuit Court of Appeals for the Second Circuit held:

> With the attorney general's finding that restraint of the appellant is required as a measure of public safety the courts have no concern. [Citations.] As these cases show, the relator's writ of habeas corpus can raise only the question whether he is an alien enemy within the statutory definition, that is, whether he is a "native, citizen, denizen or subject" of Germany.

In the *Citizens Protective League* case,* the Court of Appeals for the District of Columbia succinctly stated (155 F. 2d at 294):

> Unreviewable power in the President to restrain, and to provide for the removal of, alien enemies in time of war is the essence

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* *Citizens Protective League* v. *Clark*, 155 F. 2d 290, certiorari denied, 329 U. S. 787.

> of the Act. * * * As a practical matter, it is inconceivable that before an alien enemy could be removed from the territory of this country in time of war, the President should be compelled to spread upon the public record in a judicial proceeding the method by which the Government may detect enemy activity within our borders and the sources of the information upon which it apprehends individual enemies. No constitutional principle is violated by the lodgment in the President of the power to remove alien enemies without resort or recourse to the courts.

And in various of the other cases in which this contention was made, it was summarily rejected by the courts as too well established to warrant discussion. See, *e. g., United States ex rel. Hack* v. *Clark*, 159 F. 2d 552 (C. C. A. 7).*

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* The English courts have held that under Section 18B of the Defence (General) Regulations, S. R. & O. 1939, No. 927, p. 715, as amended by S. R. & O. 1939, No. 978, and No. 1681, pp. 811, 815; and S. R. & O. 1940, Vol. II, No. 681, p. 24, No. 770, p. 30, and No. 942, p. 58, which confers on the Home Secretary the power to order imprisonment of any person, citizen or alien, believed dangerous to the public safety, the statement of the Home Secretary that he had reasonable cause to believe that the person concerned should be imprisoned, as evidenced by his signature to the imprisonment order, is sufficient answer to a petition for a writ of habeas corpus. *Liversidge* v. *Anderson* (1941), 3 All Eng. R. 338 (H. L. 1941). See also *Liversidge* v. *Anderson and Morrison* (1941), 2 All Eng. R. 612 (C. A. 1941); *Stuart* v. *Anderson and Morrison* (1941), 2 All Eng. R. 665 (K. B. 1941); *Rex* v. *Home Secretary, ex parte Greene* (1941), 3 All Eng. R. 104 (C. A.

The excerpt which we have quoted from the *Citizens Protective League* case goes beyond the question of what was contemplated by Congress to the problem of constitutional requirements in the premises. It is to that problem which we now turn, and, in the course of our discussion of it, we shall advert to the nature of the Executive determination under the Act, the type of decision that is required, and the constitutional source of the power that is being exercised. We believe that all of these factors are relevant in determining whether, despite no provision for it in the Act, "judicial review may be nonetheless supplied". *Switchmen's Union* v. *Board, supra.* We submit that in the light of these factors and of the legislative history set out above, judicial review is not available to the petitioner.

C. *Judicial review of executive orders of removal is not required by the Constitution.*—At the outset, it should be stated that we think it plain that persons ordered removed under this statute are constitutionally entitled to recourse to the courts for a judicial determination of whether or not they are alien enemies. Cf. *Ng Fung Ho* v. *White*, 259 U. S. 276, 282–285. In this case, petitioner's status as an alien enemy is conceded. But

1941); *Rex* v. *Home Secretary, ex parte Budd* (1941), 2 All Eng. R. 749 (K. B. 1941).

And the Canadian courts have similarly refused to review orders restraining enemy aliens. See *Re Beranek*, 24 Can. Cr. Cas. 252, 33 O. L. R. 139; *Re Guetu*, 24 Can. Cr. Cas. 427.

to go further, and hold that an alien enemy is constitutionally entitled to judicial review of the Executive determination that he is of the class of alien enemies who should be removed would, we think, be patently anomalous, in the light of the nature of the power possessed by a sovereign at war over citizens or subjects of the enemy.

In our brief in the *Ahrens* case (No. 446, this Term, pp. 32–42), we have described at some length the nature of the relationship between the sovereign and an alien enemy. We demonstrated that the power over alien enemies was an attribute of the war power, that it was early referred to by Chief Justice Marshall as a "full right to take the persons * * * of the enemy wherever found", and that Mr. Gallatin, expressing a view in which he was joined by English and international law authorities, said that alien enemies "are liable to be treated as prisoners of war". The instrument which confers a power such as this is hardly one which would, at the same time, require judicial intrusion into its exercise. To find in the Constitution a right to judicial review of alien enemy orders of removal would be even more strange in the light of the well-recognized rule that recourse to the courts may be denied to alien enemies entirely "so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy." *Ex parte Kawato*, 317 U. S. 69, 75.

Moreover, the nature of the judgment committed to the President by the Alien Enemy Act is such that review by the courts would be inappropriate. *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111; *Hirabayashi* v. *United States*, 320 U. S. 81, 93. The judicial power conferred by Article III of the Constitution does not extend to a determination of political questions, a category which comprehends the executive determination here involved. *C. & S. Air Lines* v. *Waterman Corp., supra*, and cases there cited. It is often the duty of the President to act on suspicion rather than proven fact, inasmuch as the purpose of the Act is preventative, not punitive, and is directed at eliminating the danger that alien enemies may attempt to harm or hinder the country in its efforts to wage war successfully.[10] Such prevention is of peculiar importance when, as now, infiltration and fifth column activities are common methods of waging war. Hence, as the Lord Chancellor of England has said in a similar context (*Rex* v. *Halliday* (*Ex parte Zallin*), (1917) A. C. 260, 269), "It seems obvious that no tribunal for

[10] In *Case of Fries*, 9 Fed. Cas. No. 5126, Mr. Justice Iredell (then a Justice of this Court) pointed out, pp. 831–2: "In cases like this, it is ridiculous to talk of a crime, because perhaps the only crime that a man can then be charged with, is his being born in another country, and having a strong attachment to it. He is not punished for a crime that he has commited, but deprived of the power of committing one hereafter to which even a sense of patriotism may tempt a warm and misguided mind."

investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law." Cf. *Brown* v. *United States*, 8 Cranch 110, 128–129. *Re Gusetu*, 24 Can. Cr. Cas. 427.

Finally, if as we have shown (*supra*, pp. 15–18) the Fifth Congress contemplated no judicial review of Executive orders of removal, its "contemporary construction" of the Constitutional requirements in that respect is entitled to great respect. *Ex parte Quirin*, 317 U. S. 1, 41–42.

D. *Nothing in Presidential Proclamation 2655 justifies judicial review of the Attorney General's order of removal.*—A question has been raised as to whether the President, having the plenary power under Section 21 of the Alien Enemy Act to order the removal of all alien enemies, subjected the removal orders of the Attorney General to judicial scrutiny by authorizing him to order the removal from the United States of only those alien enemies "deemed * * * to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof." Proclamation 2655, Appendix B, *infra* p. 35. None of the various cases treating with internment or removal of alien enemies indicates that the existence of a delegation of only part of the Presidential power over alien enemies to one of his subordinates was considered in any way to affect the nonreview-

ability of the order. See, *e. g.*, *Citizens Protective League* v. *Clark*, 155 F. 2d 290 (App. D. C.), certiorari denied, 329 U. S. 787; *United States ex rel. Hack* v. *Clark*, 159 F. 2d 552 (C. C. A. 7); *Minotto* v. *Bradley*, 252 Fed. 600 (N. D. Ill.); *Ex parte Graber*, 247 Fed. 882 (N. D. Ala.). This view, is, we believe, sound.

Nothing in the text of Proclamation 2655 suggests that judicial review is contemplated. And to infer that the courts are to supervise the Attorney General in his exercise of powers granted him by the President is to ignore the nature of the power and the clear Congressional purpose that the Executive branch of the Government was to be left free to act in its discretion. See *supra*, pp. 8–26. In none of the various Presidential Proclamations, relating to internment or removal of alien enemies during World War II which apply only to alien enemies deemed dangerous to the public health and safety of the United States,[11] is there any indication that the President, in thus delegating only part, rather than all, of the power vested in him by Section 21 of the Alien Enemy Act, intended thereby to subject the Attorney General's order to judicial review. On the contrary, all indicate clearly that the Attorney General's authority, like that of the President, is to be one of untrammeled

[11] Presidential Proclamation 2525, 6 F. R. 6321; Presidential Proclamation 2526, 6 F. R. 6323; Presidential Proclamation 2527, 6 F. R. 6324; and see Appendix B, *infra*, pp. 33–36.

discretion free from judicial scrutiny. Thus Proclamation 2526 (6 F. R. 6323) incorporating Proclamation 2525 (6 F. R. 6321) by reference, provides that dangerous alien enemies "are subject to summary apprehension." Such apprehension is to be made by "such duly authorized officer of the Department of Justice as the Attorney General may determine." The alien enemies so arrested are to be confined in such place of detention as may be directed by the officers responsible "* * * or in such other places of detention as may be directed from time to time by the Attorney General * * *." Similarly Proclamation 2655, Appendix B, *infra*, pp. 33–36, clothes the Attorney General with an unreviewable discretion by providing for the removal of those alien enemies "who shall be *deemed by the Attorney General* to be dangerous to the public peace and safety of the United States," the departures to conform "with such regulations as he [the Attorney General] may prescribe." [Italics supplied.] The Proclamation does not require the Attorney General to make a finding of dangerousness; it simply delegates to him the duty of judging. That judgment, if made by the President would not be reviewable; it does not become so because the Attorney General acts for the President. Should the President be dissatisfied with the manner in which the Attorney General is exercising the authority granted, he can withdraw the authority entirely or direct a reversal in a

particular case. But that is a problem of executive management, not of judicial supervision. Cf. *In re Yamashita*, 327 U. S. 1, 8. A delegation of authority to a subordinate executive officer cannot give rise to judicial review when it is not otherwise available. The contrary doctrine would lead to judicial intrusion into matters that are otherwise plainly nonjusticiable; the courts could then inquire into the actions of any executive subordinate exercising a delegated authority such as the disciplining of a minor federal employee.

A holding that the President, by vesting the Attorney General with authority over only a special category of alien enemies, *i. e.*, dangerous alien enemies, inadvertently made the Attorney General's orders reviewable by the courts would be in direct conflict with Article I, Section 8, Clause 9, and Article III, Section 1 of the Constitution, vesting in the Congress, not the President, the power to establish inferior courts and thereby determine their jurisdiction. Cf. *Lockerty* v. *Phillips*, 319 U. S. 182; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156. Where Congress has withheld jurisdiction from the courts, as it has in cases arising out of Section 21 of the Alien Enemy Act (see *supra*, pp. 8–26), the President cannot confer it. Nor can the courts assume such jurisdiction where it has been withheld by Congress.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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APRIL 1948.

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067–4070, 50 U. S. C. 21–24, provides:[1]

§ 21. Restraint, regulation, and removal.

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety

[1] The section numbers used are those which appear in Title 50 of the United States Code.

(R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531).

§ 22. Time allowed to settle affairs and depart.

When an alien who becomes liable as an enemy, in the manner prescribed in section 21 of this title, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native, citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality (R. S. § 4068).

§ 23. Jurisdiction of United States courts and judges.

After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be

removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed (R. S. § 4069).

§ 24. Duties of marshals.

When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor and to execute such order in person, or by his deputy or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be (R. S. § 4070).

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (10 Fed. Reg. 8947):

PROCLAMATION 2655

REMOVAL OF ALIEN ENEMIES BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas section 4067 of the Revised Statutes of the United States (50 U. S. C. 21) provides:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;"

Whereas sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U. S. C. 22, 23, 24) make further provision relative to alien enemies;

Whereas the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

Whereas by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

Now, therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

HARRY S. TRUMAN.

By the President:

JAMES F. BYRNES,
Secretary of State.

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189) pursuant to Presidential Proclamation 2655:

Title 28—Judicial Administration

Chapter I—Department of Justice

Part 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U. S.

Sec.

30.71 Removal from the United States of alien enemies.
30.72 Order of the Attorney General.
30.73 Service of removal order on alien enemy.
30.74 Thirty-day period for voluntary departure.
30.75 Involuntary removal from the United States.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U. S. C. 21.

§ 30.71 *Removal from the United States of alien enemies.* The Proclamation of the President of the United States, No. 2655

(10 F. R. 8947), dated July 14, 1945, provides in part:

All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe.

§ 30.72 *Order of the Attorney General.* When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principle of government thereof, an order will be signed by the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen or subject.

§ 30.73 *Service of removal order on alien enemy.* A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74 *Thirty-day period for voluntary departure.* An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of

the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment under appropriate parole safeguards in order that the alien enemy may settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.* In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM C. CLARK,
Attorney General.

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